TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 425

GROUP NO. 1 OIL CORPORATION, PETITIONER,

vs.

JAMES W. BASS, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE FIRST DISTRICT OF TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,347)

(35,347)

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[fol. a-1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

No. 1176. At Law.

GROUP No. 1 OIL CORPORATION, Plaintiff,

vs.

JAMES W. BASS, United States Collector of Internal Revenue, Defendant

PLAINTIFF'S ORIGINAL PETITION—Filed Sept. 23, 1929

To the Honorable Judge of said Court:

Comes now Group No. 1 Oil Corporation, a corporation organized under the laws of the State of Delaware, hereinafter called plaintiff, and files this its original petition, complaining of James W. Bass, as Collector of Internal Revenue for the United States for the First District of Texas, hereinafter called defendant, and shows to the court as follows:

I

Plaintiff is, and has been at the various dates hereinafter alleged, a corporation organized under the laws of the State of Delaware, with its principal office in El Paso, El Paso County, Texas.

II

Defendant is, and was on the various dates hereinafter alleged, the duly appointed, qualified and acting United States Collector of Internal Revenue for the First District of Texas, which District includes El Paso County, Texas, and as such Collector he was invested with the power and authority to collect taxes upon the income of persons and [fol. 3] corporations within said District that were levied and assessed under and by virtue of the Acts of Congress

designated as the Revenue Acts of 1924, 1926 and 1928. The residence of the defendant is at Austin, Travis County, Texas.

III

The plaintiff's cause of action is to recover from the defendant the amounts of income taxes paid by the plaintiff to the defendant for the fiscal years and fiscal period beginning July 1, 1924, and ending March 31, 1928, with legal interest thereon from the dates of their payments, that plaintiff alleges were wrongfully, illegally and without authority of law collected from the plaintiff by the defendant, all as set forth hereinafter in detail.

IV

Under and by virtue of the provisions of the Revenue Acts of 1924, 1926 and 1928, and the rules and regulations prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury in connection therewith, plaintiff made out, signed, executed and returned to defendant its returns of its income from all sources for the fiscal years and fiscal period hereinafter set out, which returns were made out in accordance with forms prescribed by the Commissioner of Internal Revenue and were filed with the defendant within the times prescribed by said Revenue Acts.

V

Upon the income of the plaintiff as shown by its said income tax returns the Commissioner of Internal Revenue [fol. 4] applied the rates of income taxes provided under the Revenue Acts of 1924, 1926 and 1928, for the corresponding periods and as a result thereof assessed against the plaintiff as its income taxes for the periods of time covered by said returns the following sums, which the plaintiff paid to the defendant on or about the following dates, to-wit:

For the fiscal year beginning July 1, 1924, and ending June 30, 1925:

November 16, 1925	$5,000.00
December 11, 1925	4,882.55
March 9, 1926	4,941.27
June 9, 1926	4,941.27
April 28, 1926	395.31
Total	$20,160.40

For the fiscal period beginning July 1, 1925, and ending March 31, 1926:

June 11, 1926	$115,308.87
September 15, 1926	115,308.87
December 14, 1926	115,308.87
March 18, 1927	115,308.87
Total	$461,235.48

For the fiscal year beginning April 1, 1926, and ending March 31, 1927:

June 16, 1927	$60,545.46
September 15, 1927	60,546.12
December 16, 1927	60,545.79
March 20, 1928	60,545.79
Total	$242,183.16

For the fiscal year beginning April 1, 1927, and ending March 31, 1928:

June 15, 1928	$3,398.71
September 11, 1928	3,398.70
December 15, 1928	3,021.06
Total	$9,818.47

[fol. 5] In addition to said taxes for the said fiscal year ending March 31, 1928 there was assessed against plaintiff for said year a further amount of$3,398.74 which it paid to the defendant on or about March 18, 1929, after it had filed its hereinafter mentioned claims for refund, and only because the same was not included in its said claims for refund plaintiff does not seek to recover that amount in this present cause.

VI

All of the income of the plaintiff during said fiscal years and fiscal period, on account of which said income taxes

were assessed against the plaintiff by the United States government and collected by the defendant, was derived (except as hereinafter specified) from the sale of oil and gas produced by plaintiff under oil and gas permits and leases from the State of Texas upon a part of the public domain of said State of Texas and from operations carried on by plaintiff under said oil and gas permits and leases from the State of Texas and from its operation and enjoyment of its rights, privileges and franchises under said permits and leases. Copies of said leases are attached hereto and marked, respectively, Exhibits A and B. The tracts of land covered by said permits and leases from which it produced said oil and gas and upon which it carried on its said operations were Section Thirty-six (36) of Block Nine (9) and Section One (1) of Block (8), University of Texas lands in Reagan County, Texas.

Of plaintiff's said income, on account of which said income taxes were assessed by the United States and paid by plaintiff, only the following amounts were derived from [fol. 6] sources other than those specified in the next preceding paragraph hereof, but from the said taxable income are to be deducted the following expenses and deductions not connected with the production of said oil and gas and operations under said permits and leases, and which are allowable deductions under the Revenue Acts of 1924, 1926 and 1928, respectively, against said other taxable income, to-wit:

For the fiscal year from July 1, 1924, to June 30, 1925:

Gross Income			
Interest received			$1,481.21
Total			1,481.21
Deductions			
Interest paid		$1,887.09	
Travel expenses		8,049.96	
New York Office Expense		2,251.31	
Legal and Auditing Fees		79,877.16	
Taxes Paid:			
Filing fees	$21.00		
Gross Production Tax	51,876.73		
State & County	58.63		
Capital Stock	808.75		
Beginning Tax	55.00		
Franchise	20.00		
Revenue Stamps	75.00		
		52,915.11	
			144,980.63
Net Loss			$143,499.42

For the fiscal period from July 1, 1925 to March 31, 1926:

Gross Income

Interest received			$24,350.91
Total			24,350.91

Deductions

[fol. 7]

Traveling Expenses		$12,878.98	
Registrar Fees		303.16	
Directors Fees		120.00	
Legal and Auditing Fees		94,826.24	
Taxes Paid:			
Gross Production Tax	$167,034.90		
State & County	911.62		
Automobile Licenses	323.91		
Capital stock	9,742.00		
Transfer Tax	325.00		
Filing Fees	3.00		
		178,340.43	
			286,468.81
Net Loss			$262,117.90

For the fiscal year from April 1, 1926 to March 31, 1927:

Gross Income

Interest received	$112,713.48
Profit on sale of lease on Settles Block in Howard & Glasscock Counties, Texas	2,094.32
Total	$114,807.80

Deductions

Rentals paid on oil & gas leases on privately owned lands		$4,337.23	
Cost of drilling dry wells on leases on privately owned lands		103,560.33	
Legal and Auditing Fees		270,301.33	
Traveling Expenses		14,803.75	
Registrar Fees		400.00	
Engineering & geological expenses in connection with privately owned lands		2,910.23	
Directors Fees		170.00	
Advertising		311.00	
Taxes Paid:			
Gross Production Tax	$135,470.16		
State & County	58,521.90		
Automobile Licenses	1,328.00		
Franchise	1,302.62		
		196,622.68	
[fol. 8] Amortization of non-productive leases on privately owned lands		6,003.90	
			599,420.45
Net Loss			$484,612.65

For the fiscal year from April 1, 1927 to March 30, 1928:

Gross Income			
Interest received			$21,252.98
Sales of oil produced from leases on privately owned lands			8,479.96
Profit on sale of leases on privately owned lands			2,769.37
Total			$32,502.31
Deductions			
General operating expenses on leases on privately owned lands		10,897.63	
Rentals on leases on privately owned lands		11,705.56	
Abandoned leases on privately owned lands on cost basis		25,233.44	
Cost of drilling dry wells under leases on privately owned lands		85,708.33	
Traveling Expenses		12,865.51	
Legal and Auditing Fees		41,156.45	
Registrar Fees		605.30	
Directors Fees		80.00	
Taxes Paid:			
Franchise & Filing (Texas)	$6,947.00		
Franchise & Filing (Delaware)	22.00		
State, County and School	53,690.44		
Production Tax	47,325.02		
Automobile licenses and taxes	1,021.57		
		109,006.03	
			297,258.25
Net Loss			$264,755.94

[fol. 9]

VII

Said tracts of land, from which plaintiff produced said oil and gas and in connection with which it carried on its said operations under said oil and gas permits and leases from the State of Texas, are a part of the public domain of the State of Texas, and have always been a part of the public domain of said State and of the Republic of Texas and of the Governments preceding the Republic of Texas. Said lands, before said permits and leases thereon were executed by the State of Texas, had been appropriated and set aside by the State of Texas for the endowment, maintenance, support and benefit of the University of Texas, a university established and maintained by the State of Texas for the promotion of literature and the arts and science.

VIII

In order for the State of Texas to secure the development of its mineral resources, including oil and gas, in and

under said lands and realize upon its interest in these minerals and convert them into money for the benefit of said state and of the University of Texas, the said State of Texas enacted Chapter 83 of the Acts of the Thirty-fifth Legislature of March 16, 1917, which Act was modified in certain particulars by Section 17 of Chapter 81 of the Acts of the Thirty-sixth Legislature, Second Called Session, of July 31, 1919, Chapter 6 of the Acts of the Thirty-seventh Legislature of February 1, 1921, and by other acts of the Legislature of said State. Said Acts provided for the issuance of permits for prospecting on said lands, among others, for oil and gas, among other minerals, and further [fol. 10] provided that, upon certain conditions set forth in the Acts being performed, the owner of such a permit could obtain a lease from the State of Texas upon the land covered by his permit giving him the right during the term thereof to develop and operate said land for the production of oil and gas therefrom, the State of Texas receiving a stated sum per acre each year during the life of the lease, and in addition a royalty of one-eighth of the value of the gross amount of oil produced therefrom and one-tenth of the value of the meter output of all gas disposed of off the land, said royalties being paid monthly. The Commissioner of the General Land Office of the State of Texas was given authority to incorporate in such leases such other terms as he might deem important to protect the interests of the State, including the right to require the lessee to drill offset wells to prevent drainage by wells on adjacent private land.

Under the provisions of said Acts, the said leases, hereinbefore referred to and copies of which are attached hereto as Exhibits A and B, were issued by the State of Texas, and plaintiff became the owner of said leases in so far as said Section Thirty-six (36) of Block Nine (9) and Section One (1) of Block Two (2), University of Texas lands in Reagan County, Texas, were concerned.

Said leases are here referred to for all their terms and provisions and for all purposes as if fully set forth herein. Said leases, in addition to reserving the statutory royalties and incorporating the provisions required by the Statutes, provided among other things: (1) the lessee was required to proceed with reasonable diligence to develop and operate the property for oil and gas, and to operate each pro-

ducing well with reasonable diligence and in a bona fide [fol. 11] effort to produce the oil and gas therefrom; (2) the lessee was required to drill, either voluntarily or when requested by the Commissioner of the General Land Office, such offset well or wells as might be necessary to protect the area leased from any well or wells that might be drilled on private land in the same vicinity and within such proximity as to render offset wells reasonably necessary for the protection of the leased property; (3) if the lessee failed to proceed with reasonable diligence to develop and operate the properties or to produce the oil and gas that could be produced from wells, or to pay any royalties when due, or to comply with any provisions of the leases, or to comply with any other regulations adopted by the Commissioner of the General Land Office which were reasonably necessary for the proper execution of the provisions of the Statutes relating to said leases, the leases were subject to forfeiture because thereof.

IX

The United States and the defendant as the Collector of Internal Revenue of the United States had, and have, no power or authority to levy, assess or collect the said income taxes, as hereinbefore set forth, that they have collected from the plaintiff on account of its said income derived from the sale of oil and gas produced by it under said permits and leases from the State of Texas and from its operations under said permits and leases and from its operation and enjoyment of its rights, privileges and franchises under said permits and leases, and their collection of said income taxes from the plaintiff was and is in violation of and contrary to the Constitution of the United [fol. 12] States and was wrongful, illegal and without authority of law, all for the following reasons, among others:

1. Said income tax is a tax upon and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples, arrests and is in derogation of, the power and right of the State of Texas to develop and realize on its oil and gas resources in and under its said lands for the benefit of itself and its instrumentality, the University of Texas, and if the United States government had the power to levy, assess and collect such taxes, this power could be used by the

United States government to destroy and render valueless said power and right of the State of Texas.

2. Said income tax is a tax upon and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples, arrests and is in derogation of, said permits and leases issued by the State of Texas and chosen and created by said State as means, agencies and instrumentalities for the purpose of exercising and carrying out said power and right of said State to develop and realize upon its oil and gas resources in and under its said lands for the benefit of itself and its instrumentality, the University of Texas, and if the United States government had the power to levy, assess and collect such tax, this power could be used by the United States to destroy and render impotent said means, agencies and instrumentalities of the State of Texas.

3. Said income tax is a tax upon, and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples and arrests this taxpayer as a means, agency and instrumentality chosen by the State of Texas, through its ownership of said permits and leases, for the purpose of exercising and carrying out said power and right of said State to develop [fol. 13] and realize upon its oil and gas resources in and under its said lands for the benefit of itself and its instrumentality, the University of Texas, and if the United States government had the power to levy, assess and collect such tax, this power could be used by the United States government to destroy and render impotent this taxpayer as said means, agency and instrumentality of the State of Texas.

4. Said income tax is a tax upon and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples, arrests, and is in derogation of, the rights, privileges, licenses and franchises obtained by said taxpayer under said permits and leases from the State of Texas, and if the United States government had the power to levy, assess and collect such tax, this power could be used by the United States government to destroy and render valueless said rights, privileges, licenses and franchises obtained from said State of Texas.

5. Said rights, privileges, licenses and franchises obtained by the taxpayer under said permits and leases from the State of Texas and said permits and leases are exempt

from taxation by the United States government, and income derived by this taxpayer therefrom is exempt from taxation by the United States government.

6. Said income tax burdens, retards, impedes, hinders, impairs, controls and arrests this taxpayer as said means, agency and instrumentality of the State of Texas, in developing said lands of the State of Texas for oil and gas and producing oil and gas therefrom, and thus prevents the State of Texas from obtaining the greatest return from its royalties on the oil and gas produced from said lands, and if the United States government had the power to levy, as- [fol. 14] sess and collect such taxes, said power could be used by the United States government to prevent this taxpayer from developing said lands for oil and gas and from producing oil and gas from said lands, with the result that the State of Texas could be prevented from realizing anything upon the royalties to be paid to it under said oil and gas permits and leases.

7. If the United States had the power to levy, assess and collect said income tax, this power would have a sensible influence on the terms of said permits and leases that the State of Texas could demand and require. and the consideration that the State of Texas could require, and obtain therefor, and the amount of royalties said State could reserve; and said power could be used to such an extent that the State of Texas would have been required to grant said permits and leases on terms more disadvantageous to it and for less consideration and for less royalties reserved, and could be used by the United States to render it impossible for the State of Texas to realize a reasonable amount, if anything at all, from said permits and leases, and from its said oil and gas resources.

8. Furthermore, under the resolutions and acts of the Congress of the United States and the Congress of the Republic of Texas, and of the convention of the people of the Republic of Texas under which the Republic of Texas became one of the United States, it was definitely guaranteed by the United States government that the State of Texas should retain all the vacant and unappropriated lands within its limits, to be applied to the payment of the Republic's debts and liabilities and the residue of said lands

[fol. 15] to be disposed of as the State of Texas might direct. Said vacant and unappropriated lands included the lands covered by said permits and leases held by this taxpayer. Said income tax is contrary to and in derogation of said guarantees by the United States government that the State of Texas should retain said lands, and use, enjoy and dispose of same as it might direct, and violates said guarantees, agreements and contract between the United States and the Republic of Texas and is a tax upon and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples, arrests, and is in derogation of the rights of the State of Texas in and to said lands, as recognized and agreed upon in said acts and resolutions of the United States government and the Republic of Texas, and is a tax upon and burdens, retards, impedes, abridges, hinders, impairs, controls, cripples and arrests the above mentioned means, agencies and instrumentalities chosen and created by said State of Texas for the purpose of enjoying and exercising its said rights in said lands under said guarantees by the United States government; and if the United States government had the power to levy, assess and collect such tax said power could be used by the United States government to destroy and render valueless said guarantees and said rights of the State of Texas in and to said lands, as recognized and guaranteed by said resolutions and acts of the United States government and of the Republic of Texas, adopted and agreed upon by said two governments as a condition precedent to and in connection with the annexation of the Republic of Texas, and the admission of said Republic of Texas into the United States of America as one of the United States.

[fol. 16] X

On or about November 1, 1928, plaintiff duly filed with the defendant at Austin, Texas, its claim for the refund to it of the said income taxes it had paid to the defendant for the fiscal year beginning July 1, 1924, and ending June 30, 1925. Thereafter, on or about February 14, 1929, plaintiff duly filed with the defendant at Austin, Texas, its claims for the refund to it of all the said income taxes it had paid, as hereinbefore set forth, to the defendant for each of said fiscal years and fiscal period, beginning July 1, 1924, and

ending March 31, 1928, the claim for refund for the income taxes paid for the fiscal year ending June 30, 1925, being an amended claim amending the said claim filed for said year on or about November 1, 1928. A separate claim for refund was filed for each of said fiscal years and fiscal period. All of said claims for refund were prepared, executed and filed in accordance with the laws of the United States and with the rules and regulations prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury in relation to the preparation, execution and filing of claims for the refund of such taxes. In said claims for the refund of said taxes, plaintiff claimed that said taxes should be refunded to it on the same grounds and for the same reasons as it sets forth in this petition as the grounds and reasons upon which it should recover said taxes of and from the defendant.

[fol. 17] XI

More than six months have expired since the said claims for the refund of said taxes were filed by the plaintiff, but the Commissioner of Internal Revenue has not as yet rendered a decision upon them or upon any of them.

XII

Though the defendant has been duly requested to refund said income taxes thus wrongfully, illegally and without authority of law collected by him from the plaintiff, the defendant has wholly failed and refused and still fails and refuses to refund to plaintiff said income taxes or any part thereof, and there is still due to plaintiff and unpaid all of said income taxes so paid by it, all as more fully set forth in detail hereinbefore, together with interest thereon at the rate provided by law from the various dates the installments of said taxes were paid, all as more fully set forth in detail hereinbefore.

Wherefore, premises considered, plaintiff prays that the defendant be cited to appear and answer this its petition, and that upon a hearing hereof plaintiff have and recover judgment against the defendant for the amounts of all of said income taxes paid by plaintiff to defendant, as more

fully hereinbefore set forth, together with interest thereon at the rate of six per cent (6%) per annum from the respective dates said taxes were paid to the defendant, as more fully hereinbefore set forth, and for all of its costs herein incurred, and for such other and further relief, general and special, to which it may be entitled.

Homer L. Bruce, Baker, Botts, Parker & Garwood,
by Homer L. Bruce, Attorneys for Plaintiff.

[fol. 18] EXHIBIT A TO PETITION.

Oil and Gas Lease No. 8560

General Land Office, Austin, Texas

May 20, 1924.

Whereas the Commissioner of the General Land Office of the State of Texas, did issue the following Permits to Prospect for Oil and Gas under provision of Chap. 83, Act approved March 16, 1917, on University lands in Reagan County, viz:

Permit No. 3914, issued 7-8-19 to Elias G. Krupp on Secs. 5-6-7-8—Blk. 8;

Permit No. 3885, issued 7-7-19 to F. T. Pickrell on Secs. 25-26-35-36—Blk. 9;

Permit No. 3056, issued 7-9-19 to Haymon Krupp on Secs. 5-6-7-8—Blk. 2;

Permit No. 3940, issued 7-8-19 to Frank Gordon on Secs. 13-14-23-24—Blk. 2,

each permit aggregating 2560 acres of land.

Whereas said Permits were extended to a term of 5 years from their respective dates, under provision of Chap. 6, Act approved Feby. 1921.

Whereas under provision of Chap. 81, Act approved July 31, 1919, said Elias G. Krupp, F. T. Pickrell and Haymon Krupp did by instrument dated Nov. 5, 1923, convey to said Frank Gordon all their right, title and interest in and to said Permits Nos. 3914, 3885 and 3956, and in same in-

strument of writing all of said four hereinbefore described Permits were grouped or combined for development purposes under provision of said Chapter 81:

[fol. 19] Whereas by deed dated Nov. 10, 1923, said Frank Gordon did transfer to Edward C. Stearns of Pittsburg, Pa., all his right, title and interest in and to above described Permit No. 3940:

Whereas, by deed dated Nov. 16, 1923, said Edward C. Stearns did transfer to Big Lake Oil Co., all his right, title and interest in and to said Permit No. 3940:

Whereas it having been shown by instrument filed in this office on this May 20th, 1924, that oil was produced in commercial quantities upon Sec. 13, Blk. 2, embraced in said Permit No. 3940, also requesting that lease be issued, accompanying said request for Lease by Log of the well properly sworn to:

Whereas, it appears from the records of the General Land Office that the law has been fully complied with in developing under said Permits and in all things required before obtaining a Lease:

Now, Therefore, Know all men by these presents:

For and in consideration of the premises aforesaid and the obligations hereinafter named, the State of Texas, acting by and through J. H. Walker, Chief Clerk and acting Commissioner of the General Land Office of said State, under the laws of said State, does hereby grant and lease unto the said Frank Gordon & Big Lake Oil Company the area embraced in the hereinbefore described Permits Nos. —. as their respective interest may appear from the records hereinbefore set out in Chapter 81, Acts of 1919, for a term of 10 years with right of renewal, or renewals, together with the right to enter upon said land at all times during [fol. 20] the life of this lease for the purpose of mining, drilling and operating for petroleum or gas, and to erect and maintain all buildings, structures, fixtures, pipes, pipe lines and machinery necessary for the production, the storage and the transportation of petroleum or gas upon the following conditions, viz:

1. The owner of the rights herein conveyed shall pay to the State of Texas at the General Land Office of Texas, at Austin, Texas, a sum of money equal to a royalty of 1/8 of the value of the gross production of petroleum and shall

pay a sum of money equal to 10% of the value of all gas sold. Payments of royalty shall be made monthly and on or before the 15th of each succeeding month during the life of this lease. Payments shall be made either in cash or by exchange on some Bank in Austin, Texas, or by Post Office money order or by Express money order. When payments are made the owner of this lease or the manager for such owner shall accompany the remittance with a sworn statement of the amount produced during the next preceding month and the market price of the output, and a copy of any pipe or pipe lines or tank receipts, check or memoranda of amount paid out or into such lines or tanks. The books, accounts, receipts and discharges of all lines, pipe lines, and tanks and gas lines and gas pipes connected with the operations under this lease and pertaining to the production, transportation and marketing of the output shall be open to the examination and inspection at all times by the Commissioner of the General Land Office or his representatives, or any other representative of the State authorized by the Governor or Attorney General.

[fol. 21] 2. The value of any unpaid royalty or royalties and any sum or sums due the State upon this lease shall become a prior lien upon all production or natural gas produced upon the area leased to secure the payment of any royalties and sums due the State.

3. The owner of the rights herein conveyed shall proceed with reasonable diligence and in a bona fide effort to develop and to operate the area leased and to prosecute such drilling operations with due and reasonable diligence to the usual depth at which oil is found in other wells in the same vicinity, unless it is found in commercial quantities at a less depth: and to proceed with reasonable diligence and in a well during the life of this lease: and with due and reasonable diligence and in a bona fide effort, proceed, either voluntarily or when requested by the Commissioner of the General Land Office, to drill such other offset well or wells as may be necessary to protect such area leased from any well or wells that may be drilled on private land in the same vicinity and within such proximity as to render offset wells reasonably necessary for the protection of the interest herein.

4. The owner of the rights herein conveyed shall have the exclusive right during the life of this lease to drill for petroleum and gas on the area leased together with the right of way thereon for laying and the right to lay pipe lines to convey water, petroleum, steam or gas.

5. If any statement made by the owner of this lease which was necessary to the issuance thereof was false or untrue in [fol. 22] material matters, or should the owner hereof fail or refuse to proceed in good faith and with reasonable diligence and in a bona fide effort to develop, operate and put out the petroleum or gas at any time during the life of this lease or fail or refuse to make the proper remittance in payment for royalty or other payments, or fail or refuse to make the proper statement, or fail to furnish the required evidence of the out put and market value and other material matters relating thereto when requested, or should fail or refuse to comply with any other regulations adopted by the Commissioner of the General Land Office which are reasonably necessary for the proper execution of the provisions of the statutes relating to the subject matter herein, this lease shall be subject to forfeiture.

6. All operations in water shall be done, as far as practicable, in such manner as to prevent the pollution of such water.

7. Upon the abandonment of any well, it shall be securely plugged or closed by the owner so as to prevent the escape of salt water and the entrance of salt water or fresh water into oil or gas bearing formation.

8. All the terms and conditions herein shall extend to the heirs, successors and assigns of said lessee, if such heirs, successors or assigns are entitled, under the laws of the State of Texas, to hold the rights conveyed herein.

In testimony whereof witness the signature of the said J. H. Walker, Chf. Clerk and acting Commissioner of the General Land Office of the State of Texas, and seal of said office, this the 20th of May 1924.

[fol. 23] J. H. Walker, Chf. Clk. & Actg. Commissioner
General Land Office of Texas.

Filed May 22, 1924, at 2:50 o'clock P. M.

Recorded Vol. 4, page 551, Oil and Gas Records, Reagan County, Texas.

EXHIBIT B TO PETITION

Oil and Gas Lease No. 8607

General Land Office, Austin, Texas

July 14, 1924.

Whereas, the Commissioner of the General Land — of the State of Texas did issue the following permits to prospect for oil and gas under provisions of Chap. 83 Act approved March 16, 1917, on University Lands in Reagan County, viz:

Permit No. 3884 issued 7-7-19 to F. T. Pickrell on Secs. 3-4-9-10, Blk. 2;

Permit No. 3932 issued 7-8-19 to Frank Gordon on Secs. 15-16-21-22, Blk. 9;

Permit No. 3888 issued 7-7-19 to F. T. Pickrell on Secs. 29-30-31-32, Blk. 9;

Permit No. 3915 issued 7-8-19 to Elias G. Krupp on Secs. 1-2-11-12, Blk. 8,

Each of said Permits aggregating 2560 acres of land.

Whereas, the hereinbefore described Permits Nos. 3884, 3932, 3888 and 3915 were extended to a term of 5 years from their respective dates, under provisions of Chap. 6 Act approved Feby. 1, 1921.

Whereas, under provisions of Chap. 81, Act approved July 31, 1919, the said F. T. Pickrell and Frank Gordon did [fol. 24] by instrument dated Nov. 5, 1923, convey unto Elias G. Krupp all their right, title and interest in and to the hereinbefore described Permits Nos. 3884, 3888 and 3932, and in the same instrument of writing all of said permits, together with Permit No. 3915, which was already owned by said Elias G. Krupp, were grouped or combined for development purposes under provisions of said Chapter 81:

Whereas by deed dated Nov. 10, 1923, the said Elias G. Krupp, conveyed all his right, title and interest in and to said Permit No. 3884 to Edward C. Stearns, Pittsburgh, Pa., as evidenced by instrument filed in this office Dec. 4, 1923, and,

Whereas, by deed dated Nov. 16, 1923, the said Edward C. Stearns did transfer to the Big Lake Oil Co., all his right, title and interest in and to said Permit No. 3884, as evidenced by instrument filed in this office, Dec 4, 1923, and,

Whereas, it having been shown by instrument filed in this office, July 11, 1924, that oil was produced in commercial quantities on Sec. 1, Blk. 8, embraced in Permit 3915, and requesting that lease be issued, accompanying said request with log of well properly sworn to, and

Whereas, it appearing from the records of General Land Office that the law has been fully complied with in developing under said permits and in all things required before obtaining a lease: Now, Therefore, Know All Men By These Presents:

For and in consideration of the premises aforesaid and the obligations hereinafter named, the State of Texas, acting by and through J. T. Robison, Commissioner General [fol. 25] Land Office of said State, under the laws of said State, does hereby grant and lease unto the said Elias G. Krupp and Big Lake Oil Co. the area embraced in the hereinbefore described Permits Nos. 3884, 3915, 3888, 3932 as their respective interest may appear from the records hereinbefore set out in Chapter 81 Acts of 1919, for a term of 10 years, with right of renewal, or renewals, together with the right to enter upon said land at all times during the life of this lease for the purpose of mining, drilling and operating for petroleum or gas, and to erect and maintain all buildings, structures, fixtures, pipes, pipe lines and machinery necessary for the production, the storage and the transportation of petroleum or gas upon the following conditions, viz:

1. The owner of the rights herein conveyed shall pay to the State of Texas at General Land Office of Texas, Austin, Texas, a sum of money equal to a royalty of 1/8 of the value of the gross production of petroleum and shall pay a sum of money equal to 10% of the value of all gas sold. Payments of royalty shall be made monthly and on or before the 15th of each succeeding month during the life of this lease. Payments shall be made either in cash or by exchange on some Bank in Austin, Texas, or by Post Office money order or by Express money order. When payments are made the owner of this lease or the manager for such owner shall ac-

company the remittance with a sworn statement of the amount produced during the next preceding month and the market price of the output, and a copy of any pipe or pipe lines or tank receipt, check or memoranda of amount paid [fol. 26] out or into such lines or tanks. The books, accounts, receipts and discharges of all lines, pipe lines, and tanks and gas lines and gas pipes connected with the operation under this lease and pertaining to the production, transportation and marketing of the output shall be open to the examination and inspection at all times by the Commissioner of the General Land Office or his representatives, or any other representative of the State authorized by the Governor or Attorney General.

2. The value of any unpaid royalty or royalties and any sum of sums due to the State upon this lease shall become a prior lien upon all production or natural gas produced upon the area leased to secure the payment of any royalties and sums due the State.

3. The owner of the rights herein conveyed shall proceed with reasonable diligence and in a bona fide effort to develop and to operate the area leased and to prosecute such drilling operations with due and reasonable diligence to the usual depth at which oil is found in other wells in same vicinity, unless it is found in commercial quantities at a less depth; and proceed with reasonable diligence and in a bona fide effort to put out product of each producing well during the life of this lease; and with due and reasonable diligence and in a bona fide effort, proceed, either voluntarily or when requested by Commissioner General Land Office, to drill such other offset well or wells as may be necessary to protect such area leased from any well or wells that may be drilled on private land in the same vicinity and within such [fol. 27] proximity as to render offset wells reasonably necessary for the protection of the interests herein.

4. The owner of the rights herein conveyed shall have the exclusive right during the life of this lease to drill for petroleum and gas on the area leased together with the right of way thereon for laying and the right to lay pipe lines to convey water, petroleum, steam or gas.

5. If any statement made by the owner of this lease which was necessary to the issuance hereof was false or untrue in

material matters, or should the owner hereof fail or refuse to proceed in good faith and with reasonable diligence and in a bona fide effort to develop, operate and put out the petroleum or gas at any time during the life of this lease or fail or refuse to make the proper remittance in payment for royalty or other payments, or fail or refuse to make the proper statement, or fail to furnish the required evidence of the out put and market value and other material matters relating thereto when requested, or should fail or refuse to comply with any other regulations adopted by the Commissioner of the General Land Office which are reasonably necessary for the proper execution of the provisions of the statute relating to the subject matter herein, this lease shall be subject to forfeiture.

6. All operations in water shall be done, as far as practicable, in such manner as to prevent the pollution of such water.

7. Upon the abandonment of any well, it shall be securely plugged or closed by the owner so as to prevent the escape. [fol. 28] of salt water and the entrance of salt water or fresh water into oil or gas bearing formation.

8. All the terms and conditions herein shall extend to the heirs, successors and assigns of said lessee, if such heirs, successors or assigns are entitled, under the laws of the State of Texas, to hold the rights conveyed herein.

In testimony whereof, witness the signature of the said J. T. Robison, Commissioner of the General Land Office of the State of Texas, and seal of said office, this the 14th day of July, 1924.

J. T. Robison, Commissioner General Land Office of Texas. (Seal.)

Filed August 6, 1924, at 6:55 o'clock P. M. Recorded Vol. 5, Pages 188, Oil and Gas Records, Reagan Co. Texas

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

GENERAL DEMURRER AND ANSWER—Filed Oct. 19, 1929

Now comes James W. Bass, Collector of Internal Revenue, defendant in the above styled and numbered cause, and

demurs generally to the plaintiff's original petition filed herein on September 23, 1929, for the reason that the same does not state facts sufficient to constitute a cause of action against him, and of this he prays judgment of the Court.

John D. Hartman, United States Attorney, Attorney for Defendant.

Should the foregoing demurrer be overruled and this defendant be required to further answer herein then he denies all and singular the material allegations contained in the plaintiff's original petition, and of this he puts himself upon the country.

John D. Hartman, United States Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WAIVING JURY—Filed Oct. 19, 1929

It is stipulated by and between the parties to this cause by their respective attorneys that a trial by jury is waived and all matters of fact shall be submitted to the Court.

Group No. 1 Oil Corporation, Plaintiff, by Homer L. Bruce, Its Attorneys. James W. Bass, Collector of Internal Revenue, Defendant, by John D. Hartman, U. S. Atty., His Attorney.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed Oct. 19, 1929

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that

this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

I

The allegations contained in Division I (one) of plaintiff's original petition are true.

II

The allegations contained in Division II (two) of plaintiff's original petition are true.

III

The allegations contained in Division III (three) of plaintiff's original petition are true, except that defendant does not admit the collection of the taxes was wrongful or illegal or without authority of law.

[fol. 32]

IV

The allegations contained in Division IV (four) of plaintiff's original petition are true.

V

The allegations contained in Division V (five) of plaintiff's original petition are true. In connection with the installment of $3,398.74 taxes paid by plaintiff on March 18, 1929, it may be considered that plaintiff duly filed a claim for the refund of that amount similar to the claim filed by it for the refund of the other installments of taxes for the same year; that such claim was so filed more than six months before this cause was begun; that no decision thereon has been rendered by the Commissioner of Internal Revenue; and that plaintiff's petition asks for the recovery of said installment on the same grounds as the other installments for said year.

VI

The copies of the leases referred to in Division VI (six) of said petition, and attached thereto as Exhibits A and B,

are true copies of the original leases. The plaintiff has been the owner of each of said leases in so far as they covered Section 36 of Block 9 and Section 1 of Block 8, referred to in said Division VI, at all times since they were issued by the State of Texas, and plaintiff's said petition may be considered as alleging this fact.

It is the desire of both plaintiff and defendant to eliminate in this cause every issue affecting plaintiff's Federal [fol. 33] income taxes for the years herein involved, except the single question of exemption asserted by plaintiff. It is recognized that, even if plaintiff's contentions concerning exemption are sustained, there would remain undetermined questions as to what items of other income are taxable, and what items of expenditures are deductible, which questions cannot be adjudicated in this suit. In said Division VI of the petition there are set forth certain items of income admitted by plaintiff to be taxable, and certain items of expenditures claimed by plaintiff to be proper deductions as against said taxable income. The defendant does not agree to the correctness of these items. However, both parties hereto recognize that any items of income included in plaintiff's said returns that would be taxable in the event plaintiff's contentions for exemption for its income from said oil and gas leases are sustained, would be less than plaintiff's expenditures properly deductible against said taxable income, and in view of this, that it is unnecessary for the Court in this case to determine, if it sustains plaintiff's contentions concerning said exemption, what items of expenditures are properly deductible as against plaintiff's taxable income, and accordingly it is further agreed in reference to the allegations contained in said Division VI (six):

1. All of the income of plaintiff included in its returns for the periods involved in this cause was derived from the sale of oil and gas produced by it from said Sections 36 and 1 under the hereinbefore mentioned oil and gas leases from the State of Texas, except dividends and those items of income admitted by it in said Division VI to be [fol. 34] derived from other sources. The income taxes sued for by plaintiff were assessed against, and paid by,

it on its said income derived from the sale of said oil and gas. If plaintiff is entitled to recover any part of the taxes sued for, it is entitled to recover all of them.

2. As against any of the income of plaintiff included in its said returns that is not included in its income derived from the sale of oil and gas produced by it under said leases from the State of Texas, plaintiff is entitled to deduct therefrom expenses incurred by it and included in its said returns amounting to more than said outside income, and none of the taxes sued for were assessed or paid because of said outside income. The defendant does not admit that any particular deduction claimed by plaintiff as properly deductible from said taxable income is a proper deduction. In view of the agreement contained in this division, it is unnecessary for the Court to pass upon those items; and the final judgment in this case shall not be considered in any other case as determining which, if any, of said claimed deductions are proper deductions against plaintiff's taxable income, or on the other hand, which of said item- of income that plaintiff admits are taxable, are in fact taxable.

3. A field agent of the United States Bureau of Internal Revenue has audited plaintiff's books and has filed with the Internal Revenue Agent in Charge at Dallas, Texas, a report recommending the assessment of additional income taxes against plaintiff. Further action on said report has been suspended for the present, and the defendant, because of said situation, is not asserting herein any claim against [fol. 35] plaintiff because of said proposed additional assessment. Accordingly, if the final decree in this cause should be in favor of the plaintiff, such decree shall not bar the defendant or the United States from collecting any additional taxes upon any income, if any, of plaintiff, not reported in its said returns that may be properly assessed, on the ground that defendant did not in this cause assert plaintiff's liability therefor. Likewise, if the final decree in this cause should be in favor of the defendant, such decree shall not bar the defendant or the United States from collecting any additional taxes upon plaintiff's income included in its said returns, or not, that may be properly assessed, on the ground that defendant did not assert in this cause plaintiff's liability therefor.

VII

The allegations contained in Division VII (seven) of plaintiff's original petition are true.

VIII

The allegations contained in Division VIII (eight) of plaintiff's original petition are true.

IX

The defendant does not admit the allegations contained in Division IX (nine) of plaintiff's original petition, but denies the same, pages 10 to 15 Orig. Petition.

X

The allegations contained in Division X (ten) of plaintiff's original petition are true.

[fol. 36]

XI

The allegations contained in Division XI (eleven) of plaintiff's original petition are true.

XII

In connection with the allegations contained in Division XII (twelve) of plaintiff's original petition, it is admitted that the defendant has been duly requested to refund the income taxes sued for by plaintiff, and he has refused to refund them to plaintiff. Defendant does not admit that the collection of said taxes was wrongful, illegal, or without authority of law. Defendant does not admit that any of said income taxes are due to plaintiff.

Signed in duplicate, each copy of which may be used as an orig-nal, this 9th day of October, 1929.

Homer L. Bruce, Attorney for Plaintiff, Group No. 1 Oil Corporation. John D. Hartman, United States District Attorney for the Western Division of Texas, Attorney for Defendant.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT IN FAVOR OF DEFENDANT—Filed Oct. 19, 1929

To the Honorable Judge of said Court:

Now comes James W. Bass, Collector of Internal Revenue, defendant in the above styled and numbered suit, and at the close of all of the testimony for both the plaintiff and the defendant moves the Court for a judgment in his favor for the reason that the facts are not sufficient to constitute a cause of action against him.

James W. Bass, Collector of Internal Revenue, Defendant, by John D. Hartman, U. S. Attorney.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT—Filed Oct. 22, 1929

Comes now the plaintiff Group No. 1 Oil Corporation after close of the testimony and before the court has decided or announced his decision herein and before the entry of final judgment herein and moves the court to enter judgment in favor of the plaintiff and against the defendant for the amount sued for by the plaintiff and interest as sued for by the plaintiff and its costs herein incurred because under the pleadings, the evidence and the undisputed facts plaintiff is entitled to the judgment against the defendant for the full amount sued for and interest as sued for and all of its costs herein incurred.

Homer L. Bruce, Baker, Botts, Parker & Garwood, by Homer L. Bruce, Attorneys for Plaintiff.

Dated October 19, 1929.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

No. 1176. At Law

GROUP NO. 1 OIL CORPORATION, Plaintiff,

vs.

JAMES W. BASS, United States Collector of Internal Revenue, Defendant

MEMORANDUM OPINION—Filed Feb. 19, 1930

The submission of the case is on its merits, an agreed statement of facts and waiver of jury. Plaintiff sues for refund of taxes as unlawfully collected because assessed on incomes received arising from instruments styled "Oil and Gas Leases" executed by the State of Texas, lessor, to the plaintiff, of certain described lands belonging to the State of Texas and the University of Texas, by the terms of which plaintiff acquired all of the oil and gas to be produced, the State to receive therefor a consideration in cash of an amount equal to the value of one-eighth of the gross quantity of oil produced, and an amount equal to the value of one-tenth of gas produced and sold. Plaintiff's net income from these two sources for the years 1925, 1926, 1927 and 1928 was taxed by the United States and the amount $733,397.51 paid.

The questions presented are whether or not the net incomes realized by plaintiff lessee from oil and gas produced on lands belonging to the State and University of Texas [fol. 40] are (1) exempt from taxation by the United States by the terms of the State annexation compact between the Republic of Texas and the United States, or (2) lawfully taxable by the terms of the Constitution of the United States.

Upon the close of the admission of evidence at the trial each party moved for judgment. The material facts being admitted, the disputed issues are those of law. The instruments are "Oil and Gas Leases," respectively, "No. 856" and "No. 8607," copies of which are attached to the original petition as Exhibits "A" and "B."

The truth of allegations of fact in plaintiff's original petition is conceded by stipulation, except immaterial mat-

ters in Paragraph Nine, and in other immaterial particulars.

The leases are executed by the State, through the Commissioner of the General Land Office, to plaintiff's assignors. Some of the provisions, in brief, are: "* * * does hereby grant and lease * * *" for 10 years, with right to enter upon said land at all times during the life of the lease for the purpose of mining, drilling and operating for petroleum or gas, to erect buildings, pipe-lines, storage, on condition:

"(1) The owner of the rights herein conveyed shall pay to the State of Texas * * * a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum and shall pay a sum of money equal to 10 per cent of the value of all gas sold. * * *

(2) The value of any unpaid royalty or royalties and any sum or sums due the State * * *" are a prior lien on all production.

(3) Reasonable diligence is required in drilling and de- [fol. 41] veloping, with "bona fide effort to put out the produce of each producing well during the life of this lease, * * *" to drill offset wells.

"(4) The owner of rights herein conveyed shall have the exclusive right * * *" to drill during the life of the lease and also right-of-way to lay pipe-lines.

(5) The owner of the lease, upon failure to perform enumerated requirements or to comply with any regulations adopted by the Commissioner of the General Land Office, will subject the lease to forfeiture.

"(6) * * *
(7) * * *"

(8) All terms and conditions shall extend "to the heirs, successors and assigns" of the lessee. The leases are signed by the Acting Commissioner of the General Land Office of Texas, with seal.

The lands leased first acquired status as property as being part of the domain of the King of Spain; then by succession passed to the Republic of Mexico; thence to the Republic of Texas; and, finally to the State of Texas and

the University of Texas. The vacant and unappropriated lands of the Republic were conceded by the United States, in the admission compact with the Republic of Texas, as vested in the State of Texas, "to be disposed of as said State may direct."

Plaintiff's claims for refund are: That the lands leased were originally acquired and held by the Republic of Texas in its sovereign capacity; and that by the treaty compact with the United States the right of the State of Texas to dispose of such lands was ceded without condition, other than that the United States should not be held for any [fol. 42] debts or liabilities of the Republic. Therefore, to tax the lands or the proceeds derived from their sale or lease would be to burden and hinder the State in the exercise of its treaty right to dispose of its lands as it might direct. Likewise a tax imposed on the incomes of plaintiff lessee derived therefrom, being the means and instrumentalities used by the State of Texas in the exercise of its unlimited right of disposal of its lands, would burden, impair, hinder, limit and destroy such right.

The defendant contends: That only strictly governmental activities of a state are immune from Federal taxation; that in this case neither the development of oil and gas by the State, nor the maintenance by the State of its University, are strictly governmental activities. Therefore, plaintiff's incomes, being profits made in disposing of oil purchased from the State, are subject to the Federal tax assessed and collected.

The ability and industry of counsel have exhausted all sources of authority. The issues are narrowed to essentials. Stated in question form, they are:

First. What is the effect of the treaty guarantee on the right of the State of Texas to dispose of the lands of the Republic of Texas?

Second. Are the so-called leases, and the plaintiff lessee-purchaser, the means and instrumentalities used by the State to develop its land for the State and its University?

Third. Is the maintenance by the State of its University a strictly governmental activity?

[fol. 43] Fourth. Do the taxes on the incomes derived by plaintiff as lessee-purchaser of State lands, being the

State's means and instrumentality, impair and abridge the State's right to dispose of its lands?

* * * * * * *

First. Question Answered: The State of Texas came into being through resolutions of the Congress of the United States and the Convention of the Republic of Texas, the Republic thus becoming a state. The resolutions are found in 5 U. S. Statutes 797; 9 U. S. Statutes 108; Gammel's Laws of Texas, Vol. 2, pages 1200, 1225 and 1228. The specific guarantee to the State is as follows:

"2. And be it further resolved, that the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to-wit:

"Second. Said State * * * shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States."

No issue of fact is in the record to indicate the existence of any debts or liabilities of the Republic of Texas. It is therefore assumed that the State is granted the right to dispose of its landed domain as it "may direct." The Legislature of the State, by mandate of the Constitution, was directed to establish and provide for the support and [fol. 44] maintenance of the University of Texas. See State Constitution 1876, Art. 7, Secs. 10 to 15, inclusive. One million acres of land, in addition to previous grants, were set apart for the support of the University.

The Legislature passed laws concerning the disposal of the University lands. The act providing terms under which permits, leases and sales could be made appeared in Chapter 83 of Acts of the Thirty-fifth Legislature, March 16, 1917, and is still effective. It applies to the methods used in this case.

Pursuant to the treaty grant, the State, through its fundamental law, directed that a million acres of land be set apart by the Legislature for the support of the University.

They were so set apart. Acting through its Legislature, the State directed that the oil and gas underlying its University lands be developed by means of sales of oil in place, to be paid for only when reduced to possession by capture, or, in the words of the lease, when "produced." The right so to dispose of these essential elements of land through the means employed is included by the words of the treaty compact. There is no room for construction or interpretation of the words conferring unlimited right to dispose. They are clear and all-embracing and should be given effect. The right being without limitation, none can be placed by the United States on the means and instrumentalities used by the State in disposing of its lands.

The Court holds that the effect of the treaty compact is: That the State could dispose of its lands in the exercise of a strictly governmental activity or otherwise as it might [fol. 45] direct; and therefore the United States has no power to impede or hinder the means and instrumentalities used by the State in exercising its unlimited right of disposal.

Second. Question Answered: The method used by the State to develop the oil and gas on its University lands here being developed was to make the lease-purchase contracts with plaintiff, the incomes resulting therefrom to plaintiff being taxed, collected and sued for herein. It is common knowledge that search for oil and gas is highly speculative. Oil drilling requires the employment of specialists, geologists, chemists, machinists, and the like. Oil when found must be "produced" at the well's mouth and sold there or at a distance, by transport in tank cars or pipe-lines, to refineries, or to world markets. A state might embark in the business of producing oil, but to do so would be unusual. The oil-lease method of development by land-owners is customary.

Accordingly, the Court holds that the State of Texas in the exercise of a common sense judgment, selected plaintiff, by the lease contracts in evidence, as the means through which to explore and develop the oil and gas underlying its University lands. This character of contract is considered by authority as being legitimate "means and instrumentalities" when used by the United States and the States in like development. Choctaw, Okla., Gulf Railroad v. Har-

rison, 235 U. S. 292; Indian Territory Illuminating Oil Co. v. Okla., 240 U. S. 522; Gillespie v. Okla., 257 U. S. 501; Jaybird Mining Co. v. Wier, 271 U. S. 609; Metcalf v. Mitchell, 269 U. S. 523-524.

[fol. 46] Third. Question Answered: The rule of the common law that it is the duty of the parents to educate the child, if considered as in effect at the time of the adoption of the Constitution of the United States has generally been supplemented by constitutional and statutory enactments in the several states which recognize that education is one of the functions of government, and the public school system is now a department of the government. "The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic, and thereby to increase the usefulness and efficiency of the citizens, on which the government of society depends." 24 R. C. L. 558. Education as a governmental activity is exercised by the Federal government to a limited extent. The States generally have by statutes assumed the public education of its citizens. This has become so uniformly widespread as to warrant the conclusion that public education as a governmental function was not included in the constitutional grant of powers to the Federal government, but was reserved to the sovereign states.

South Carolina vs. United States, 199 U. S. 437, declares that strictly governmental activities must be classified by recourse to the common law in interpreting the Constitution and "also to the position of the framers of the instrument, and what they must have understood to be the meaning and scope of the grants of power contained therein." The expression is of doubtful application to the facts of this case.

[fol. 47] Texas was admitted to the Union in 1845, fifty-five years after the adoption of the Federal Constitution, and unlike other states, retained its unappropriated public domain with unlimited right of disposal. Plaintiff and the lease contracts are the means used by the State to dispose of its lands.

In South Carolina v. United States, the issues were whether engaging in the business of dispensing liquor by the State was a private business or the exercise of a strictly

governmental activity, and whether the National government's power to impose license taxes on the private business of that character applied where the State was conducting such business. The question here is whether or not public education became a strictly governmental activity by virtue of statutes of the Republic in effect at the time that Texas was admitted to the Union, and the constitutional and legislative enactment since.

The congress of the Republic of Texas, in the exercise of the governmental function, passed an act of date January 6, 1839 (2 Gammel's Laws of Texas 134) directing the President to set aside 50 leagues of land to establish two colleges thereafter to be created. Texas came into the Union in December, 1845, and passed an act February 11, 1858, (4 Gammel's Laws of Texas 1020), establishing the University of Texas, appropriating $100,000.00 therefor, and setting aside additional lands for the purpose. This act recites that it had been the fixed design of the people of the Republic and of the State that there should be established an institution for the instruction of the youth of [fol. 48] the land, to be so endowed as to be within the reach of rich or poor a thorough education, as a means to attach young men to the institutions of the State, and that the liberties of the people might be encouraged. The State Constitution of 1876, directed the Legislature to provide for the maintenance of the University of Texas. Pursuant thereto, the present University of Texas was created, March 30, 1881, (9 Gammel's Laws of Texas 171), to be governed by eight regents nominated by the Governor and appointed by and with the advice of the Senate, the government of the University being subject at all times to the control of the Legislature. The University is not a corporation. Its affairs are directed and controlled exclusively by the State. The title to what is commonly called University lands is in the State. Appropriations for maintenance and operation are regularly made by the Legislature. The University is in fact and in law a branch of the State government. See cases cited in 24 Ruling Case Law, supra.

The authorities give no clear definition of "governmental activities," nor the degree of strictness required.

The courts determine the question from the facts in the particular cases. No principle of the common law effective at the time of the adoption of the Constitution in 1791 is cited as holding that public education is or is not a strictly governmental activity. South Carolina was conducting a private business, buying and selling liquor, therefore liable for the taxes levied. Lacking law or facts as of the effective period, the statutes of the states supersede the common law, if any, and should control. It is common knowl-[fol. 49] edge that the states, by constitutional and legislative enactments and appropriations, are educating their people—unquestionably governmental activities, but are they "strictly" so? Education is not bought and sold like physical commodities. It is fair to say that public education by the states is the rule and private education the exception. A principle of construction that the sovereign states could in future exercise only such sovereign rights as were known to the common law, or the law of nations, at the time of the adoption of the Constitution, means a rigidity out of harmony with judicial expressions to the effect that our Constitution is flexible and continues to meet and adjust itself to the new and rapidly changing conditions.

Important facts worthy of repeating are that public education was in the minds of the fathers of the Republic of Texas in January, 1839, when the President was directed by the Congress to set aside 50 leagues of land to establish public colleges. Lands and funds were appropriated by the Legislature of the State of Texas in 1858. A million acres were set apart by constitutional mandate in 1876 for the benefit of the University, established by the Legislature in 1881, and continued maintenance since.

The facts here differ in material particulars from those in South Carolina v. United States. The rule that strictly governmental activities may be ascertained only in the light of conditions of law and fact existing at the time of the adoption of the Constitution are not applicable to the case at bar.

Accordingly, the Court holds, that since 1839 the Re-[fol. 50] public and the State of Texas evidenced an earnest intention by appropriations of lands and funds, to adopt education as a governmental policy; and that since

1881, by the constitutional mandate and legislative enactment, the State, through its University and public schools, has undertaken the education of its peoples as a strictly governmental activity.

Fourth. Question Answered: This question is answered in the affirmative by the cases cited in support of the reply to Question Two.

The defendant contends that there is no evidence in the record to show that either the State or University would suffer any injury by the tax levy. After reviewing all the decisions of the Supreme Court bearing on the Indian lease contracts and Oklahoma's attempt to levy a tax on a lessee's income in Gillespie v. Oklahoma, 506, supra, the opinion closes with the following statement: "Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms for its wards"—citing Weston v. Charleston, 27 U. S. 448 (1829), Marshall, Chief Justice.

The cases hold that a tax imposed upon incomes from a lease of the character in evidence is a direct hamper on the efforts of the lessor sovereign to make the best terms [fol. 51] for itself or its beneficiary. The Court finds that there is evidence in the record to give application to the principle declared. A careful study of the cases cited, and those cited in the opinions rendered, is convincing that all principles of law arising from the facts in this case have been considered.

The plaintiff relies on Gillespie v. Oklahoma, supra, as authority directly in point and of controlling weight as to the law. The defendant argues that South Carolina v. United States, supra, controls because that case declares that states that engage in private business are subject to the Federal excise tax, and that only strictly governmental activities are free from Federal tax. In ruling that the maintenance of its State University was strictly a governmental activity, and therefore free of the tax, the Court has stated the reasons upon which they are based.

From the foregoing it results that the plaintiff is entitled to the refund of taxes, collected by the defendant in the amounts sued for. Form of judgment in accordance may be submitted for entry within ten days from date hereof. A list of cases considered is appended as a foot note.

Done at Austin, Texas, this 19th day of February, A. D., 1930.

Duval West, Judge.

[fol. 52] Cases Considered

Ambrosini v. United States, 187 U. S. 1;
Bank of Commerce v. New York City, 67 U. S. (2 Black) 620;
Bank Tax Case, 69 U. S. (2 Wall.) 200;
Childers v. Beaver, 270 U. S. 555;
Choctaw, Okla. & Gulf R'y Co. v. Harrison, 235 U. S. 292;
Collector v. Day, 78 U. S. (11 Wall.) 113;
Dobbins v. Commissioners of Erie County, 41 U. S. (16 Peters) 434;
Farmers & Mech. Nat'l Bank v. Dearing, 91 U. S. 29;
Flint v. Stone Tracy Company, 220 U. S. 107;
Gillespie v. Oklahoma, 257 U. S. 501;
Grayburg Oil Co. v. State of Texas, Sup. Ct. Rep. Vol. 49, Pg. 185;
Heiner v. Colonial Trust Co., 275 U. S. 232;
Howard v. Gypsy Oil Co., 247 U. S. 503;
Indian Territory Illum. Oil Co. v. Oklahoma, 240 U. S. 522;
Jaybird Mining Co. v. Weir, 271 U. S. 609;
Johnson v. Maryland, 254 U. S. 51;
Large Oil Company v. Howard, 248 U. S. 549;
Long v. Rockwood, 277 U. S. 142;
Metcalf & Eddy v. Mitchell, 269 U. S. 514;
M'Culloch v. The State of Maryland, 4 Wheat 316;
Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Osborne v. The Bank, 9 Wheat. 737;
Panhandle Oil Co. v. Knox, 277 U. S. 218;
[fol. 53] Pollock v. Farmers Loan & Trust Co., 157 U. S. 429;
Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575;
South Carolina v. United States, 199 U. S. 437;

Van Brocklin v. Tennessee, 117 U. S. 151;
Weston v. City Council of Charleston, 27 U. S. (2 Peters) 448;
Williams v. City of Talladega, 226 U. S. 404;
Burnes National Bank v. Duncan, 265 U. S. 17;
California v. Central Pacific Ry. Co., 127 U. S. 1;
Thomson v. Pacific R. R., 9 Wall, 579;
Railroad Company v. Peniston, 18 Wall. 5;
United States v. Perkins, 163 U. S. 625;
Plummer v. Coler, 178 U. S. 115;
Veazie Bank v. Fenno, 8 Wall. 533;
Snyder v. Bettman, 190 U. S. 249;
Theisén v. Robison, 8 S. W. (2d) 646;
Bank of North Dakota v. Olson, 33 Fed. (2d) 848;
Davis v. Gray, 83 U. S. (16 Wall.) 203;
United States v. Rickert, 188 U. S. 432.

[File endorsement omitted.]

[fol. 54] In United States District Court for the Western District of Texas, Austin Division

No. 1176. At Law

Group No. 1 Oil Corporation, Plaintiff,

vs.

James W. Bass, United States Collector of Internal Revenue, Defendant

Decree—Filed Feb. 28, 1930

Be it remembered that on the 19th day of October, 1929, came on to be heard the above numbered and entitled cause, and came the plaintiff Group No. 1 Oil Corporation by its attorneys and the defendant James W. Bass, United States Collector of Internal Revenue, by his attorneys, and all parties announced ready for trial. A jury having been expressly waived in writing, the matters of law and of fact were submitted to the court. The court having heard and considered the pleadings, evidence and argument of counsel is of the opinion and does now on this 28th day of February,

1930, order, adjudge and decree that the plaintiff Group No. 1 Oil Corporation do have and recover judgment against the defendant James W. Bass, United States Collector of Internal Revenue for the First Internal Revenue District of Texas, for the sum of Seven Hundred Thirty six Thousand Seven Hundred Ninety Six and 25/100 Dollars ($736,796.25), together with interest thereon at the rate of six per cent (6%) per annum, said interest to be computed from the various dates the installments representing said [fol. 55] aggregate amount were paid by the plaintiff to the defendant, said installments being as follows and the dates from which the said interest is to be recovered being set opposite each installment, to-wit:

November 16, 1925	$5,000.00
December 11, 1925	4,882.55
March 9, 1926	4,941.27
June 9, 1926	4,941.27
April 28, 1926	395.31
June 11, 1926	115,308.87
September 15, 1926	115,308.87
December 14, 1926	115,308.87
March 18, 1927	115,308.87
June 16, 1927	60,545.46
September 15, 1927	60,546.12
December 16, 1927	60,545.79
March 20, 1928	60,545.79
June 15, 1928	3,398.71
September 11, 1928	3,398.70
December 15, 1928	3,021.06
March 18, 1929	3,398.74

It is further ordered, adjudged and decreed that all process necessary and appropriate for the enforcement of this judgment issue.

To which judgment the defendant in open court excepted and upon his application, the court allowed and the defendant is hereby granted sixty (60) days after adjournment of the present Austin term of court within which to settle and file bills of exceptions and do all other things and procure [fol. 56] proper orders for completion of the record for effective appeal from this judgment.

Duval West, United States District Judge.

Approved:
Homer L. Bruce, Attorney for Plaintiff. John D. Hartman, U. S. Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions and Order Settling Same—Filed April 1, 1930

Before Honorable Duval West, United States District Judge, Without a Jury

Be it remembered that this action was commenced in the United States District Court for the Western District of [fol. 57] Texas in the Austin Division thereof, by the plaintiff's petition filed September 23, 1929; that thereafter on October 19, 1929 the defendant filed a general demurrer and general denial; that on October 19, 1929 written stipulations were entered into by the parties to this suit waiving a trial by jury. That on October 19, 1929 an agreed statement of facts was filed herein. That on the 19th day of October, 1929 all matters of law and fact were submitted to the Court, after which and before judgment was entered, on October 19, 1929 the defendant at the close of all of the testimony moved the Court for a judgment in his favor for the reason that the facts were not sufficient to constitute a cause of action against him. That thereafter on October 22, 1929 the plaintiff filed a motion before the entry of judgment, moving the Court to enter judgment in favor of the plaintiff and against the defendant for the amount sued for by the plaintiff because of the pleadings, the evidence and the undisputed facts the plaintiff is entitled to judgment. That thereafter the Court took the matter under advisement and filed a memorandum opinion on February 19, 1930, in substance and effect holding that the plaintiff under the pleadings and the evidence was entitled to recover the full amount sued for, and directing that a judgment be prepared and entered in accordance with said opinion.

That thereafter, to wit, on the 28th day of February 1930, a judgment was filed in accordance with the opinion of the Court, to which judgment the defendant in open court excepted, and the Court allowed the defendant sixty days after the adjournment of the present Austin term of Court [fol. 58] within which to settle and file bills of exception and do all other things and procure proper orders for completion of the record for effective appeal from this judgment. That the effect of the Court's opinion was to overrule the defendant's general demurrer filed herein and to overrule the defendant's motion for a judgment filed herein as above indicated, to all of which the defendant now excepts and tenders this as his bill of exceptions.

And now in furtherance of justice and that right may be done to the defendant, the defendant tenders and presents the foregoing as his bill of exceptions in this cause to the action of the Court and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record in this cause.

Dated at San Antonio, Texas, on this the 1st day of April, A. D. 1930.

John D. Hartman, United States Attorney, Attorney for Defendant.

The above and foregoing Bill of Exceptions is hereby settled and allowed and ordered filed as part of the record in this cause.

Dated at San Antonio, Texas, this the 1st day of April, A. D. 1930.

Duval West, United States District Judge.

[File endorsement omitted.]

[fol. 59] In United States District Court

[Title omitted]

Defendant's Petition for Appeal—Filed April 1, 1930

Now comes James W. Bass, Collector of Internal Revenue, defendant in the above styled and numbered cause, and says that on or about the 28th day of February, A. D. 1930, this Court entered judgment in favor of the plaintiff,

Group No. 1 Oil Corporation, and against the defendant, James W. Bass, Collector of Internal Revenue, in which judgment and proceedings prior thereto in this cause certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the Assignments of Error which are filed with this petition; that this judgment is to all intents and purposes a judgment against the United States.

Wherefore, premises considered, the defendant prays that an order be issued by the Court allowing an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals, and that an order be made to the effect [fol. 60] that this appeal may be prosecuted without supersedes or cost bond and that all further proceedings may be suspended until the determination of said Writ of Error by said Circuit Court of Appeals.

John D. Hartman, United States Attorney, Attorney for the Defendant.

[File endorsement omitted.]

ASSIGNMENT OF ERRORS—Filed April 1, 1930

Now comes the defendant in the above styled and numbered cause and hereby makes the following Assignments [fol. 61] of Error which he avers occurred upon the trial and the proceedings in said cause, to wit:

1. The Court erred in not sustaining the defendant's general demurrer to the plaintiff's original petition.

2. The Court erred in not sustaining the defendant's motion for a judgment in his favor made at the close of the testimony.

3. The Court erred in rendering judgment for the plaintiff for the reason that the law and the facts are not sufficient to sustain such judgment.

Dated this the 1st day of April, A. D. 1930.

John D. Hartman, United States Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL WITHOUT BOND—Filed April 1, 1930

On this the 1st day of April, A. D. 1930, came the defendant, James W. Bass, Collector of Internal Revenue, and filed herein and presented to the Court his petition praying for the allowance of an appeal, and the defendant filed Assignments of Error intended to be urged by him and praying that a transcript of the record and proceedings and papers upon which the judgment herein was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that such other and further proceedings may be had as may be proper in the premises; and

The defendant further praying that neither supersedes nor cost bond be required for the reason that the judgment entered herein is to all intents and purposes a judgment against the United States;

It is, therefore, ordered by the Court that the defendant, James W. Bass, Collector of Internal Revenue, be and is [fol. 63] hereby allowed an appeal as prayed for without bond.

It is further ordered that further proceedings in this cause be suspended until the determination of said appeal by the Circuit Court of Appeals for the Fifth Circuit.

Duval West, United States District Judge.

[File endorsement omitted.]

[fol. 64] Citation, in usual form, showing service on Baker, Botts, Parker & Garwood, filed April 1, 1930, omitted in printing.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR RECORD—Filed April 1, 1930

To the Honorable D. H. Hart, Clerk U. S. District Court, Western District of Texas:

You will please include in the record upon appeal in the above entitled cause the following documents and proceedings:

1. Plaintiff's Original Petition.
2. Defendant's General Demurrer and Answer.
3. Stipulations Waiving a Jury.
4. Agreed Statement of Facts.
5. Defendant's Motion for Judgment in his favor.
6. Plaintiff's Motion for a Judgment in its favor.
7. The Court's Memorandum Opinion.
8. Judgment of the Court.
9. Defendant's Bill of Exceptions.
10. Defendant's Assignments of Error.
11. Petition for Appeal.
12. Order allowing Appeal without bond.

[fol. 66] 13. Appeal.
14. Citation on Appeal.
15. Acceptance of Service of Citation.
16. Præcipe for Record.
17. Clerk's Certificate.

John D. Hartman, United States Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 67] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CERTIFIED COPY OF HOUSE BILL NO. 812, STATE OF TEXAS—Filed April 22, 1930

A Bill to be Entitled

An Act to amend Article 7504, Revised Civil Statutes of 1911, by making clear the purpose and intent of the law to tax certain character of lease-hold interests in land authorizing the lessee, grantee or licensee to mine and to prospect for and take from lands stone, granite, fossils, minerals, including oil and gas; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 7504, Revised Civil Statutes of the State of Texas, be amended so as to hereafter read as follows:

Art. 7504. Real property for the purpose of taxation shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, and other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same, also all lease-hold interests whereby the lessee, grantee or licensee is authorized to mine and prospect for and take from lands, stone, granite, marble, fossils, minerals of any kind, including oil and gas.

Sec. 2. The fact that the right of the state to tax lease-hold interests in lands under which the lessee, grantee or licensee is permitted to prospect for and mine or take from said lands minerals, including oil and gas, is being disputed by the owners of said lease-hold interests, and the state [fol. 69] is being forced to have litigation with such persons, therefore the necessity to render the law of this state upon said subject beyond cavil or the possibility of a doubt, creates an emergency and an imperative public necessity requiring that the constitutional rule requiring bills to be read on three several days in both Houses be suspended,

and it is accordingly so done, and that this act be in force and take effect from and after its passage, and it is so enacted.

Floor Report

Committee Room, Austin, Texas

March 19, 1913.

Hon. Chester H. Terrell, Speaker of the House of Representatives.

Sir: Your Committee on Revenue and Taxation, to whom was referred House Bill No. 812, a bill to be entitled, An Act to amend Article 7504, Revised Civil Statutes of 1911, by making clear the purpose and intent of the law to tax certain character of lease-hold interests in land, authorizing the lessee, grantee or licensee to mine and to prospect for and take from lands stone, granite, fossils, minerals, including oil and gas; and declaring an emergency.

Have had the same under consideration, and I am instructed to report it back to the House with the recommendation that it do pass.

Mangum, Chairman.
Kirby.
Spradley.
Burges.
(For the purpose of getting before the House only.)
Roach.
Lane.

[fol. 70]

Dove.
Kennedy.
Patton.
Davis.
King.
Powell.
Diffie.

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[fol. 71] [Endorsed:] H. B. 812. By Kennedy. A bill to be entitled An Act to amend Article 7504, Revised Civil Statutes of 1911, by making clear the purpose and intent of the law to tax certain character of leasehold interests in land authorizing the lessee, grantee or licensee to mine and to prospect for and take from lands stone, granite, fossils, minerals, including oil and gas; and declaring an emergency. 318, 1913. Read first time and referred to Committee on Revenue & Taxation. Terrell. Favorable Floor Report. 3-19-13. (7)-Z.

[fol. 72] Form No. 7

(Seal of the State of Texas)

The State of Texas, Department of State

I, Jane Y. McCallum, Secretary of State, of the State of Texas, do hereby certify that the foregoing is a true and correct copy of House Bill No. 812, Introduced at the 33rd Legislature; and the report attached thereto, with the endorsement thereon, as now appears of record in this Department.

In Testimony Whereof I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 10 day of April A. D. 1930.

(Signed) Jane Y. McCallum, Secretary of State.
(Seal.)

Form 860B—G57-320-10M.

[fol. 73] Minute entry of argument and submission April 22, 1930, omitted in printing.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 5881

JAMES W. BASS, Collector of Internal Revenue for the United States for the First District of Texas, Appellant,

versus

GROUP No. 1 OIL CORPORATION, Appellee

Appeal from the District Court of the United States for the Western District of Texas

John D. Hartman, U. S. Atty., Ottamar Hamele, Special Atty. Bur. Int. Rev. (C. M. Charest, Genl. Counsel, Bur. Int. Rev. on the brief), for Appellant.

Homer L. Bruce (Baker, Botts, Parker & Garwood on the brief) for Appellee.

Before Bryan and Foster, Circuit Judges, and Grubb, District Judge

OPINION—Filed June 18, 1930

BRYAN, Circuit Judge:

Appellee brought suit and recovered judgment against appellant, as collector of internal revenue, for the amount of federal income taxes paid under protest. Those taxes were assessed and collected upon net income derived from the sale of oil and gas produced from lands which appellee [fol. 75] held under lease from the State of Texas. The judgment was based on the theory that appellee was an instrumentality of the state, and as such was exempt as to the income involved from federal taxation. 38 F. (2) 680.

The leased lands from which the income was derived are parts of the public domain of Texas which long ago, by constitutional and statutory provisions, was set apart for the benefit of the State University. In 1917 an act of the legislature, chapter 83, provided for the leasing of university lands for the development of oil, gas and other natural resources. Lessees were required to pay royalties of one-eighth for oil and one-tenth for gas. By §27 of that act rights acquired under it were declared to be "subject to

taxation as is other property." That legislation was attacked as being in violation of a constitutional provision which permitted only the sale of university lands; but the Supreme Court of Texas held that the statutory leases constituted sales, and that the oil and gas when appropriated by the lessees formed no part of the university's permanent fund. Theisen v. Robison, 8 S. W. (2) 646. The royalty interest of the state is not involved, as the income tax act does not attempt to reach it.

Appellee, as is admitted, was liable for the income taxes assessed against it, unless it can claim exemption as a state instrumentality. It may be assumed without being decided that the state was entitled to claim exemption for itself, or even for appellee as its instrumentality, in developing the public domain. In a series of cases the Supreme Court of the United States has held that the State of Oklahoma could not interfere with lessees of Indian lands by imposing an occupation or privilege tax, Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S. 292; by taxing such leases, Indian Oil Co. v. Oklahoma, 240 U. S. 522; by imposing a [fol. 76] tax on the gross value of the production of oil and gas less a royalty interest, Howard v. Oil Companies, 247 U. S. 503, and Large Oil Co. v. Howard, 248 U. S. 549; or by a tax upon the net income derived by a lessee from the sale of his share of oil and gas, Gillespie v. Oklahoma, 257 U. S. 501.

The last cited case, which reviews the previous ones, held that the lessee of an oil and gas lease of Indian lands was an instrumentality of the federal government in carrying out treaty obligations to the Indians. Appellee's position is that the converse of that proposition must be equally true, and that therefore it is an instrumentality of the state government of Texas in carrying out its public policy in developing lands which it holds for the benefit of its university. In our opinion the Gillespie case and the other cases from Oklahoma which preceded it are not in point. The state of Texas has no occasion to claim immunity for itself, and has not sought to exempt lessees of its university lands from federal income taxation. On the contrary, it has sold the mineral rights here involved and has provided that the rights of the purchaser or lessee "shall be subject to taxation as is other property." It cannot be doubted that the sovereign has the power to subject interests which

it has sold in public lands to taxation. Heiner v. Colonial Trust Co., 275 U. S. 232. In Shaw v. Gibson-Zahniser Oil Corporation, 276 U. S. 575, a case which also involves an oil and gas lease of Indian lands, it was held that the income of the lessee was subject to state taxation in Oklahoma under the Act of Congress of March 27, 1908, ch. 199, which in §4 provided "that all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of [fol. 77] other persons than allottees of the Five Civilized Tribes." The language making the Indian lands subject to taxation is no broader or more comprehensive than is the language of the Texas statute making the rights of lessees of its university lands subject to taxation. The State of Texas by throwing the leases of university lands open to taxation generally, withdrew from the lessees all rights of exemption which might otherwise have existed. Our conclusion is that the taxes in question were properly assessed and collected, and consequently that it was error to give judgment for appellee.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 5881

JAMES W. BASS, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE FIRST DISTRICT OF TEXAS,

versus

GROUP NO. 1 OIL CORPORATION

JUDGMENT—June 18, 1930

This cause came on to be heard on the transcript of the record from the District Court of th United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

[fols. 79-89] Petition for rehearing, covering 11 pages, filed July 7, 1930, omitted from this print. It was denied, and nothing more by order August 1, 1930.

[fol. 90] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—August 1, 1930

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 91] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed Aug. 6, 1930

To the Honorable Judges of said Court:

Comes now Group No. 1 Oil Corporation, Appellee in the above entitled and numbered cause, and respectfully represents and shows to the Court that it is its purpose to apply to the Supreme Court of the United States for a writ of certiorari therein at as early a date as practicable and within the time limited by law. It, therefore, prays the Court to enter an order staying the issuance of the mandate in said cause for a reasonable time within which a petition for said writ of certiorari may be prepared and filed.

Respectfully submitted.

(Signed) Homer L. Bruce, Homer L. Bruce, Attorney for Appellee.

[fol. 92] Subscribed and sworn to before me, the undersigned authority, by Homer L. Bruce, this 4th day of August, 1930.

(Signed) C. H. Wilson, Notary Public in and for Harris County, Texas. (Seal.)

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 6th day of August, 1930.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 94] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR REHEARING AND ALLOWING CERTIORARI—Filed November 24, 1930

On consideration of the petition for rehearing filed herein, and in view of the interest of the State of Texas, as

stated by it as amicus curiæ in support of the petition for rehearing, it is now here ordered by the Court that the said petition be, and the same is hereby, granted. The order heretofore entered on October 20, 1930, denying the petition for writ of certiorari herein is vacated, and it is ordered that the petition for writ of certiorari in this cause to the United States Circuit Court of Appeals for the Fifth Circuit be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,347. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 425. Group No. 1 Oil Corporation, petitioner, vs. James W. Bass, Collector of Internal Revenue for the United States for the First District of Texas. Petition for a writ of certiorari and exhibit thereto. Filed September 6, 1930. File No. 35,347.